

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2079

To be argued by
HUGH C. HANSEN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2079

ANTHONY C. DELUTRO,
Petitioner-Appellant,

—v.—

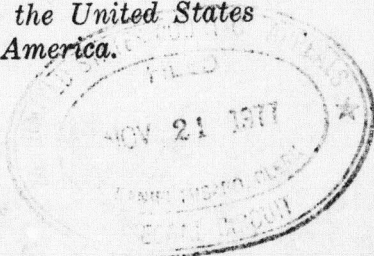
UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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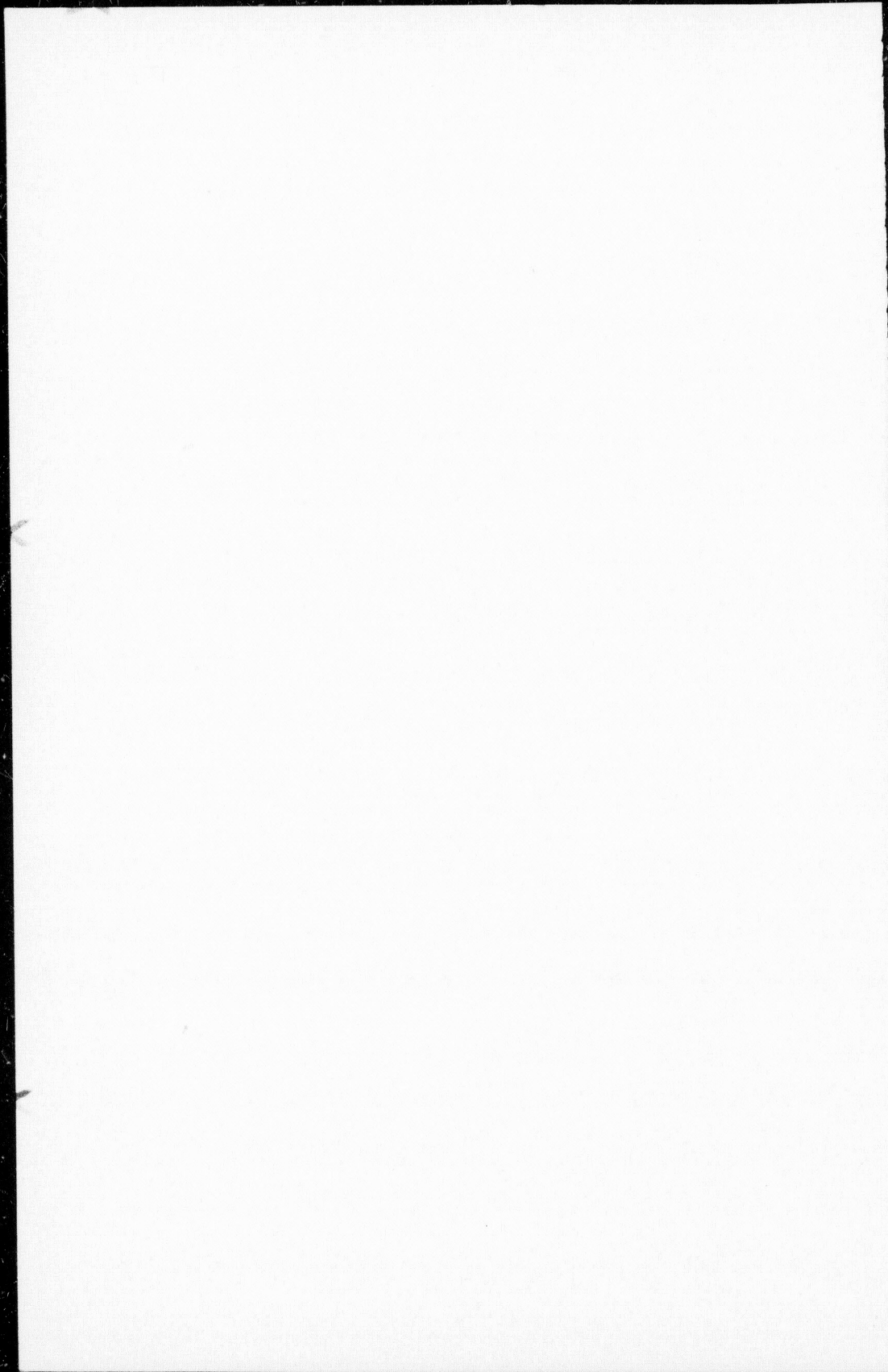


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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2079

ANTHONY C. DELUTRO,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Anthony DeLutro appeals from an order filed on May 11, 1977 in the United States District Court for the Southern District of New York by the Honorable Edward Weinfeld, United States District Judge, denying DeLutro's motion pursuant to Title 28, United States Code, Section 2255 to vacate his judgment of conviction based on his plea of guilty on November 4, 1955, and from the June 17, 1977 order of Judge Weinfeld denying DeLutro's motion for reargument.*

Indictment 148 C 267 was filed on October 31, 1955, and charged Anthony DeLutro and co-defendant Matthew C. Ruby with violations of the federal narcotics laws.

* DeLutro proceeded pro se in the District Court and has retained counsel for this appeal.

DeLutro was named in five of the six counts of the indictment. On November 4, 1955, DeLutro pleaded guilty to the five counts before the Honorable Sidney Sugarman, United States District Judge. On November 22, 1955, DeLutro was sentenced on Count One to two years imprisonment to be followed by two years of probation and a one dollar fine. Imposition of sentence was suspended on the remaining counts.

On July 10, 1975, DeLutro was again charged with violations of the federal narcotics laws. Count One of Indictment S75 Cr. 687 charged DeLutro and 19 co-defendants with conspiracy under 21 U.S.C. § 846 to violate the federal narcotics laws from January 1, 1973 through July 10, 1975. Count Eight charged DeLutro with intent to distribute approximately five kilograms of heroin in or about November, 1973. On October 24, 1975, a jury found DeLutro guilty on both counts. On December 3, 1975, the Honorable Irving Ben Cooper, United States District Judge, sentenced DeLutro as a second felony offender to 25 years imprisonment, to be followed by six years of special parole on each count. The sentences were to run concurrently. DeLutro's conviction was affirmed by this Court. *United States v. Magnano*, 543 F.2d 431 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

On January 21, 1977, DeLutro filed the instant petition pursuant to 28 U.S.C. § 2255 to vacate his sentence and conviction in *United States v. DeLutro*, 148 C 267 (S.D.N.Y. 1955). The petition claimed that Judge Sugarman had not complied with Rule 11, Fed. R. Crim. P., when accepting DeLutro's plea of guilty on November 4, 1955.

On May 11, 1977, Judge Weinfeld denied DeLutro's petition. On June 17, 1977, Judge Weinfeld denied De-

Lutro's motion "for relief from final judgment", treating it as an application for reargument.

Statement of Facts

On October 27, 1955, Anthony DeLutro was arrested while making a delivery of 9 ounces of heroin. (Tr. 61).^{*} Indictment 148 C 267 was filed on October 31, 1955 charging DeLutro and co-defendant Matthew Ruby in six counts with the possession and sale of heroin in violation of 21 U.S.C. §§ 173, 174. DeLutro was named in five of the counts.

On November 4, 1955 DeLutro pleaded guilty to all five counts. He thereby acknowledged his involvement in the sale of almost one pound of heroin in a period of one month, which, as Judge Cooper noted at DeLutro's sentencing on the 1975 conviction, was "a considerable quantity of heroin by 1950's standards." (Tr. 61).

The guilty plea minutes show that DeLutro's attorney was given a copy of the indictment on the first call and the plea was taken on the second call. The clerk read Counts One and Three in their entirety to DeLutro. After reading each of Counts One and Three, DeLutro was asked if he understood the count, and he responded "Yes." The clerk then stated that Count Four was dated October 11, 1955, and charged DeLutro with unlawfully selling two ounces, 177 grains of heroin. In a similar fashion Counts Five and Six were read to DeLutro, and after the reading of each count, DeLutro stated that he understood each count. Finally DeLutro was asked again

^{*} The designation "Tr." will refer to the sentencing minutes of December 3, 1975 in *United States v. Magnano*, See, 75 Cr. 867 (IBC). The designation "App." refers to the appellant's appendix filed in the instant appeal.

if he understood all the charges. He responded affirmatively, and was then asked the following:

The Clerk: Do you plead guilty or not guilty?

The Defendant: Guilty.

The Clerk: To all counts in which you are named?

The Defendant: That is right. (App. 10-11).

The plea minutes also show that the government and defense counsel made additional statements. These statements were not transcribed and it is impossible at this date to determine what was said.*

On November 22, 1955, Judge Weinfeld sentenced DeLutro on Count One to the minimum period of confinement under 21 U.S.C. § 174—two years, plus two years probation and a one-dollar fine, the payment of which was remitted. Imposition of sentence was suspended on Counts Three, Four, Five and Six. DeLutro did not appeal his conviction or sentence.

DeLutro was released from prison on June 18, 1957. He then began to serve a state sentence arising from a narcotics conviction entered the same month as the federal conviction. DeLutro had also pleaded guilty in that case. The narcotics transactions which formed the basis for the state indictment were contemporaneous with those transactions in the federal indictment. DeLutro was released from state custody on December 15, 1959.

On July 10, 1975, DeLutro was again charged with violations of the federal narcotics laws. Indictment S75

* The government has been informed by the Southern District of New York Court Reporters that the notes for this plea have been destroyed.

Cr. 867 charged a massive drug conspiracy involving millions of dollars worth of drugs. As Judge Cooper noted "the evidence on the trial, among other things, showed that [DeLutro] sold . . . over ten pounds of pure heroin in November '73 and was paid a quarter of a million dollars in cash. It also showed that DeLutro had access to even greater amounts of pure heroin at the time and that he was active all the way back to the early '60s." (Tr. 62-63). At trial it was estimated that the "street value" of the ten pounds of pure heroin after dilution for sale was approximately five million dollars.

On December 3, 1975, DeLutro along with his co-defendants were sentenced. Judge Cooper described DeLutro's participation in a conspiracy involving enormous quantities of heroin and reviewed DeLutro's extensive criminal record. (Tr. 62-63). Judge Cooper further informed DeLutro that as a result of his 1955 conviction, he would be treated as a second felony narcotics offender, and the maximum sentence was therefore 60 years and a \$100,000 fine, instead of 30 years and a \$50,000 fine.* The District Court sentenced DeLutro to 25 years in prison on each count with a special parole term of six years, the sentences to run concurrently. DeLutro received no fine. Despite the fact that DeLutro was being treated as a second felony narcotics offender, neither DeLutro nor his lawyer mentioned any defects in the 1955 conviction which served as the predicate for the second felony offender treatment. (Tr. 27-30).

DeLutro appealed his conviction, but not the sentence, and this Court affirmed the conviction. *United States v. Magnano*, 543 F.2d 431 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

One month after the Court of Appeals opinion was filed, DeLutro filed a pro se motion in S75 Cr. 687

* Therefore, even if the 1955 conviction were vacated, Judge Cooper could still impose the 25 year sentence he gave DeLutro.

(IBC) to "correct the sentence". He claimed the sentence was illegal because Judge Cooper failed to comply with the requirement of 21 U.S.C. § 851(b) that the Court ask DeLutro whether he affirmed or denied the previous conviction in 1955. This motion was denied by Judge Cooper on January 28, 1977.

On January 21, 1977, DeLutro filed the instant petition to vacate his sentence in 148 C 267 pursuant to 28 U.S.C. § 2255. DeLutro did not submit an affidavit stating that he had not voluntarily made the plea of guilty or that he had not understood the charges against him. DeLutro made no claim that if there had been no irregularities in the plea, he would have acted any differently with regard to the plea. Moreover, no affidavit of DeLutro's attorney at the time of the plea was submitted in support of the petition.

The petition's only claim was that the minutes of the plea "did not demonstrate a factual basis for believing that the Petitioner understood any of the consequences of his plea" and therefore "a hearing as to voluntariness of the plea must be undertaken by this Court to determine whether the plea was voluntary with the requisite understanding." Memorandum of Law in Support of Motion to Vacate Sentence, 10. DeLutro's affidavit in support of the petition merely stated that the District Court had not complied with Rule 11.

On May 11, 1977, Judge Weinfeld filed an opinion dismissing the petition.* DeLutro filed a motion for

* Judge Weinfeld's opinion reads as follows:

More than twenty-one years after petitioner pled guilty to the sale of approximately one pound of heroin, he seeks vacatur of his conviction solely upon the basis that the then applicable provisions of Rule 11, Fed. R. Crim.

[Footnote continued on following page]

relief from final judgment. Judge Weinfeld treated this as an application for reargument and denied it on June 17, 1977.

ARGUMENT

The District Court Properly Denied Petitioner's Motion To Vacate His Twenty-One-Year-Old Guilty Plea.

DeLutro contends that the District Court should have granted an evidentiary hearing so he could have developed more fully his claim that his 1955 guilty plea was not taken in compliance with Rule 11, F. R. Crim. P. In view of the claims made by DeLutro in his petition, and the record below, Judge Weinfeld acted properly in denying without a hearing DeLutro's motion to vacate his 1955 conviction.

P., were not complied with. However, "only those defendants whose guilty pleas were accepted after April 2, 1969, are entitled to plead anew if their pleas were accepted without full compliance with Rule 11." *Halliday v. United States*, 394 U.S. 831, 833 (1969). Even assuming petitioner's allegations of infirmity are correct, he makes no claim nor adduces any proof that his plea of guilty was not voluntarily and *understandingly* made, or that it was constitutionally infirm in any way. *See, e.g., Kercheval v. United States*, 274 U.S. 220, 223-24 (1927); *Creely v. United States*, 535 F.2d 934, 935 (5th Cir. 1976).

Significantly, petitioner was represented by a former Assistant United States Attorney who later, as a private attorney, conducted an extensive criminal practice in this and other courts; yet no affidavit from him has been submitted nor any explanation offered for its absence.

Accordingly, the petition is dismissed.

A. The Petition Failed To Allege Sufficient Evidentiary Facts To Require A Hearing

It is well settled that a successful attack on a guilty plea made prior to the Supreme Court's decision in *McCarthy v. United States*, 394 U.S. 459 (1969) must show considerably more than a failure to comply with the requirements of Rule 11. *Halliday v. United States*, 394 U.S. 831, 833 (1969). Indeed even a petitioner who had pleaded guilty after the Supreme Court's decision in *McCarthy v. United States*, *supra*, and who claims that there was not full compliance with Rule 11, "must at least show prejudice affecting the fairness of the proceedings or the voluntariness of the plea in order to succeed in a collateral attack" on his guilty plea. *Del Vecchio v. United States*, 556 F.2d 106, 111 (2d Cir. 1977).^{*} Consequently before DeLutro would be entitled to any relief he would have to show a clear violation of Rule 11 as formulated in 1955, and he would have to prove prejudice affecting the fairness of the proceedings or the voluntariness of the plea. DeLutro's papers do not allege sufficient facts to support either conclusion.

^{*} The question of whether DeLutro can show any prejudice is of course critical in evaluating the merits of a collateral attack made twenty-one years after conviction. As the Supreme Court stated in *Davis v. United States*, 417 U.S. 333, 346 (1974):

"In *Hill v. United States*, 368 U.S. 424, 429 (1962) for example, we held that 'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of an indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' *Id.*, at 428."

DeLutro has submitted no affidavit claiming that the guilty plea was not voluntary or that he did not understand the rather simple charges against him. He alleges no facts to show prejudice affecting the fairness of the proceedings or the voluntariness of the plea as required by *Del Vecchio v. United States*, *supra*, 556 F.2d at 111. He fails to claim that he would not have made the plea if the alleged irregularities had not been present. *Id.* at 112; *Bye v. United States*, 435 F.2d 177, 179 n.5 (2d Cir. 1970). All that DeLutro alleges here is that the Court failed to comply with Rule 11 and that this failure deprived DeLutro of his due process rights. (App. 6-7). This is not enough.

Of course, even if DeLutro had submitted an affidavit alleging in conclusory terms that his plea was involuntary and that he did not understand the charges, this would still not be enough. An evidentiary hearing would not be required "unless evidentiary facts were alleged in such detail as to have raised sufficiently substantial issues" *Seiller v. United States*, 544 F.2d 554, 567 (2d Cir. 1975); *Michel v. United States*, 507 F.2d 461, 464 (2d Cir. 1974); *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974).

Furthermore, DeLutro's failure to submit an affidavit by the attorney who represented him at the time of the guilty plea indicating that the attorney did not advise DeLutro of the nature of the charges or the consequence of his guilty plea is significant. This Court has noted that when a § 2255 petition claims ignorance or misunderstanding about an issue which the defendant's attorney had knowledge, failure to present an affidavit from the attorney invites suspicion and is itself reason to deny a claim without holding a hearing. *United States v. Santelises*, 476 F.2d 787, 790, n.3 (2d Cir. 1973); *Grant v. United States*, 451 F.2d 931, 933 (2d Cir. 1973); *United States v. Wisniewski*, 478 F.2d 274, 284 (2d

Cir. 1973). The inclusion of such an affidavit would not have necessarily entitled DeLutro to a hearing, *see Michel v. United States*, 507 F.2d 461 (2d Cir. 1974), but its absence highlights the inability of DeLutro to state a claim under § 2255. *See Del Vecchio v. United States, supra*, 556 F.2d at 112, 113.

Recognizing the fatal effect of these omissions, DeLutro's appellate counsel has attempted to justify DeLutro's failure to submit either his own detailed affidavit or an affidavit by his attorney. As to DeLutro's own failure, he states that "the pro se papers of the defendant himself were not artfully drawn. . . . Unfortunately defendant is not an educated man, and just was not up to the task." Appellant's Brief at 7, 9. This claim cannot withstand closer scrutiny. A review of the pro se papers shows that rather than being inartfully drawn they are rather sophisticated.* (Appellant's Appendix has omitted DeLutro's eight-page memorandum of law and his five-page motion for relief from final judgment.) DeLutro is not an indigent pro se plaintiff.** Rather he is a sophisticated veteran of the criminal justice process.*** This sophistication was demonstrated in the

* DeLutro's pro se memorandum of law and motion for relief from final judgment cite and discuss numerous cases. They clearly articulate the reasons to support the collateral relief he seeks, and can hardly be characterized as inartfully drafted.

** There is no claim or indication that DeLutro proceeded pro se because he could not afford a lawyer. He paid the filing fees and as noted below in 1976-77 he had two lawyers working on his 1975 conviction—one on the appeal and one on a motion for reduction of sentence.

*** Besides his 1955 conviction in the Southern District of New York, DeLutro has had other experiences with the criminal justice system. He pleaded guilty to attempted felonious possession of narcotic drugs with intent to sell in New York State court in November 1955. In July, 1964 DeLutro was charged in the Eastern District of New York with the purchase of stolen United

[Footnote continued on following page]

papers below and also in DeLutro's pro se papers submitted to correct the sentence imposed in 1975 for failure to comply with 21 U.S.C. § 851(b) and again in this proceeding when DeLutro wrote to the Pro Se Clerk in the Southern District of New York to inform her that his § 2255 petition had been assigned to the wrong judge. He was correct and the petition was reassigned to Judge Weinfeld.

Of course, DeLutro has not always acted pro se. When he had the direct assistance of counsel he did not make any claim that the 1955 plea of guilty was in any way invalid. At his 1975 sentencing, a very logical time to attack the federal conviction which served as the predicate for the second offender treatment, DeLutro's lawyer did not attack that conviction. On the contrary, he in effect supported its validity by claiming the contemporaneous state conviction was for the same narcotics transaction and that "Mr. DeLutro pleaded guilty in both cases." (Tr. 27).

DeLutro's counsel on appeal further claims that the reason there is no affidavit from Moses Kove, the attorney at the 1955 plea, was because DeLutro had been confined in prison and that Mr. Kove had retired from his position as Commissioner of the Taxi and Limousine Commission and from his law practice. "Thus, it is understandable

States Postage stamps. He was convicted in February, 1965 and sentenced to two years in jail. This conviction was reversed on appeal. In February, 1965 he was charged in a state narcotics conspiracy case brought under the New York Penal Law. The charges against him were dismissed. In May, 1969 he was charged in the Southern District of New York with the sale of liquor without payment of federal tax. He was convicted in February, 1971 and sentenced to two years imprisonment and a \$500.00 fine. Finally, as discussed above he was charged in 1975 in the Southern District of New York with participation in a massive drug conspiracy and was convicted in October, 1976.

that DeLutro was not able to communicate with Moses Kove." Appellant's Brief at 8.

However, in January, 1977 when DeLutro filed his petition, Mr. Kove was still the Commissioner of the Taxi and Limousine Commission. He did not retire until July, 1977. As a Taxi Commissioner Mr. Kove was probably easier to locate than if he was merely practicing law. If DeLutro while confined in prison was able to obtain the 21 year old minutes of his 1955 plea from the Federal Archives in Bayonne, New Jersey, which his affidavit below indicates he in fact did, then he could have obtained Mr. Kove's phone number or address at the Taxi and Limousine Commission. But even if he could not, the attorney who represented him for most of 1976 on his appeal from the 1975 conviction, or the attorney who represented him at trial and again in 1977 to make a motion for reduction of sentence, could have obtained the address if either had been asked.

B. The 1955 Requirements Of Rule 11 Were Met

Even if DeLutro could succeed upon a showing of a violation of Rule 11, the petition would still fail because the 1955 requirements of the rule were met. In 1955, Rule 11 in relevant part read as follows:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.

Prior to 1966 the District Court in determining that the guilty plea was voluntarily made did not have to follow a set of specific procedures, and "may have relied on the circumstances surrounding a plea of guilty, without making specific inquiry or findings, to conclude that the

plea was voluntarily and understandingly given." *Halliday v. United States*, 394 U.S. 831, 834 (Harlan, J. concurring).

An examination of the 1955 plea minutes reveals that the District Court fully complied with Rule 11. DeLutro was represented by Moses Kove, an experienced criminal lawyer, and a former Assistant United States Attorney. The minutes of the plea indicate that Mr. Kove had a copy of the indictment before the plea and he presumably already had a copy of the October 27, 1955 complaint, charging DeLutro with the same sale of heroin as did Count Six of the indictment. The nature of the charges against DeLutro in the indictment were very simple. As noted, the indictment set out five separate narcotics transactions in which DeLutro allegedly sold heroin.* Each count differed only in the date of the sale and the amount of heroin sold. (App. 9-10). Any defendant could easily understand these charges.

The court clerk at the time of the plea read each charge to DeLutro and asked him if he understood that charge. DeLutro answered "yes". After reading all the charges the clerk asked if he understood all of the charges. DeLutro answered "yes". The clerk then asked DeLutro how he pled and DeLutro answered guilty to all the charges. (App. 10-11). Thus, DeLutro said that he was guilty of selling heroin on five different occasions, and he reiterated that he understood these rather simple and straightforward charges.

There is another factor which lends additional support to the conclusion that the plea was voluntary and that DeLutro understood the charges. At the time of DeLutro's sentence in 1975, Judge Cooper referred to De-

* For example, Count One read that on or about September 22, 1955, Anthony DeLutro unlawfully, willfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of approximately 424 grains of heroin.

Lutro's 1955 guilty plea, and observed that DeLutro had been arrested while making a delivery of 9 ounces of heroin. (Tr. 62). This statement by Judge Cooper was not contested by DeLutro or his counsel. A defendant arrested in 1955 selling this much heroin might well plead guilty with the hope that in openly acknowledging his criminal involvement the sentencing judge would consider this act of contrition as a mitigating factor at the time of sentence.*

On appeal DeLutro also claims that the plea minutes fail to establish any factual basis for the plea. A factual basis for the plea was not a specific requirement of Rule 11 in 1955. However, a factual basis was supplied by the recitation of the very simple charges and DeLutro's plea of guilty. As this Court stated in *Kloner v. United States*, 535 F.2d 730, 734 (2d Cir.1976), concerning the application of amended Rule 11 which unlike the language of the rule in 1955 explicitly mandated that a guilty plea not be accepted unless the court "is satisfied that there is a factual basis for the plea":

"Ordinarily the mere recital of the charge coupled with an admission of guilt will not suffice to demonstrate a factual basis for a guilty plea. But here we are not faced with a complex crime such as a conspiracy in which interlocking and subtle elements may be capable of generating confusion, or with a case involving multiple defendants when the guilt of a particular defendant may have been mistakenly inferred from the acts of others. Nor is this an instance where the defendant

* The actual sentence imposed upon DeLutro reveals that his guilty plea may well have worked to his advantage. DeLutro could have received 25 years in prison and a \$10,000.00 fine. Yet for selling almost a pound of heroin in 1955, he received two years in prison with two years probation and a \$1.00 fine. The two-year sentence was the mandatory minimum at that time.

acknowledged his guilt in an ambiguous fashion, or where the defendant's response constituted little more than a 'limited or conditioned' admission of guilt, coupled with a 'protestation of innocence'. Instead, the indictment specified conduct constituting a relatively simple offense [bank robbery]. . . . Thus, the district court's reading of the charge, to which the defendant acknowledged guilt, set forth the underlying factual elements of the crime." (Citations omitted).

Thus, the minutes of DeLutro's guilty plea coupled with the circumstances surrounding that plea show that the requirements of Rule 11 were met, and negate any claim of prejudice affecting the fairness of the proceedings or the voluntariness of the plea.

Finally, it bears considerable emphasis that this case involves a guilty plea made over twenty-one years ago. Such a collateral attack made "only belatedly" should be viewed with circumspection. See *Seiller v. United States*, 544 F.2d 554, 568 (2d Cir. 1975); *United States v. Riley*, 312 F. Supp. 235, 236-37 (S.D.N.Y. 1970). DeLutro could have but did not appeal his conviction; he could have but did not collaterally attack the plea while he was serving his two year prison sentence twenty-one years ago; and he could have but he did not raise the claim that the plea and conviction were invalid when he was sentenced for subsequent convictions in order to mitigate the effect of his past criminal record. This is especially true with regard to the 1975 conviction. During these many years, DeLutro has repeatedly had the assistance of counsel. In short there is no justification for the delay in raising this claim, and the result of DeLutro's unjustified delay is that there is no longer

a complete record of the 1955 plea proceeding * and Indictment 148 C 267 could probably never be tried.** These are reasons alone for dismissing DeLutro's petition.

In sum, DeLutro's collateral attack on a twenty-one-year-old conviction based on a guilty plea is precisely the situation contemplated by this Court in *Del Vecchio v. United States*, 556 F.2d 106, 109 (2d Cir. 1977):

"[R]igid enforcement of [Rule 11] many years after the plea has been taken erodes the principle of finality in criminal cases and may allow an obviously guilty defendant to go free because it is impossible, as a practical matter, to retry him. This is not a result that commends itself to many people, including judges." (Citations omitted).

*The notes of the court reporter have been destroyed and therefore we are left with only the notation that the prosecutor and defense counsel made statements to the court.

**The government's file in this case has been destroyed pursuant to its policy to destroy the files in any closed case which is over 15 years old and as to which there has been no request to save the file. However, even if the file had not been destroyed, the passage of 22 years would most likely preclude a trial in any case.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submit

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HUGH C. HANSEN,
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Of Counsel.*

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Hugh C. Hansen being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 21st day of November, 1977
he served ~~a~~ ^{two} copy of the within Brief for the United States of America
by placing the same in a properly postpaid franked
envelope addressed:

H. Elliot Waks, Esp.
ATTORNEY AT LAW
747 Third Avenue
New York, N. Y. 10017

And deponent further says that he sealed the said en-
velope and placed the same in the mail box ~~drop for~~
~~mailing~~ *outside* the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Gladys D. D'Angelis
Sworn to before me this

Hugh C. Hansen

21st day of *November*, 1977

GLADYS D. D'AN
NOTARY PUBLIC, State of New York
No. 52-4518541, Suffol. Co.
Term Expires March 30, 1979

